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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO._____

GULF OIL CORPORATION, *Petitioner*

v.

KENNETH LEHRMAN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Gulf Oil Corporation for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case.

1. Opinions Delivered in Courts Below

The United States District Court for the Western District of Texas, Waco Division, did not write an opinion. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on March 15, 1972, and is reported in ... F.2d ..., a copy of which is attached hereto. Upon petition for rehearing, the Court of Appeals withdrew a portion of its original opinion and substituted therefor a supplemental opinion dated June 26, 1972, a copy of which is attached hereto.

2. Jurisdictional Statement

The opinion by which rehearing was denied is dated June 26, 1972, and the judgment sought to be reviewed is dated March 15, 1972, but it was not issued until July 5, 1972, following consideration of the petition for rehearing. A copy of such judgment is attached hereto. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1254 of Title 28 of the United States Code, as well as the provision of Supreme Court Rule 19(1)(b).

3. Questions Presented

The questions presented for review are:

(a) Whether an international company's practice in granting cents off wholesale price to enable its dealers to meet local competitive conditions invokes federal jurisdiction under the antitrust laws based upon alleged coercive pricing against a local merchant on one of its products which was produced, manufactured, transported, and sold solely within the confines of one state.

(b) Whether a supplier can legitimately police "the price actually charged by his own retailer after support is granted to insure that the dealer is not pocketing the price support instead of passing it on to consumers through lower retail prices." (Court's Opinion, pgs. 32, 33 infra)

(c) Whether, in a Section 1 Sherman Act case based upon coercive pricing, evidence of alleged discriminatory prices and practices occurring elsewhere is proper to prove the coercive practices in issue.

(d) Whether damages for injury to "business or property" under the antitrust laws can be calculated by multiplying anticipated profits by the number of years expected to be in business; or the value of the going business at the time of its demise; or the difference between what could have been earned except for the condemned conduct less what was actually earned.

4. Statutes Involved

The statutes of the United States, the interpretation and application of which are involved, provide as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." (15 U.S.C.A. Sec. 1)
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C.A. Sec. 15)

5. Statement of the Case

Federal jurisdiction of pricing behavior **[questions (a) and (b)]:**

Lehrman operated the only service station handling Gulf branded gasoline in Mart, Texas, a small, Central Texas town located about 20 miles east of Waco. He became a Gulf dealer on November 8, 1959, and operated the station for almost nine years, selling on the average between 8000 and 9000 gallons of gasoline per month. (Pl. Ex. 35) His best year was 1964 when he sold a total of 128,750 gallons; however, 25,000 of this total was sold in bulk for nonhighway and agricultural use. (Tr. 65, 66)

This operation continued until October 17, 1967, when Lehrman voluntarily surrendered the station during the middle of the lease year (Tr. 106, 107) even though an attempt was made to persuade him to continue. (Stipulation 15, App. p. 22; Tr. 104, 478)

The manner in which the gasoline was delivered and priced to Lehrman is typical. At each bulk plant — Groesbeck in this case — there is a scheduled dealer tank wagon price (DTW). This is the price which Gulf charges the dealer for the gasoline delivered to his station from that bulk plant. It is the same for all dealers served from the same bulk plant.

In instances of price disturbance or "price wars," Gulf reduces its price to the individual dealers affected by this severe competition in order that such dealer may, if he so desires, reduce his selling price. It is not compulsory; the dealer is not required to reduce his price as a condition to his being given a lower price by Gulf. (Tr.

58-60) By the same token, Gulf does not give this lower price to all dealers served from the same bulk plant. Not all are affected by the same competition. (Tr. 459-460)

Since the dealer tank wagon price remains as scheduled, this price reduction is given as a temporary competitive allowance (TCA) off of scheduled price. It varies from dealer to dealer depending upon the severity of his competition. Sometimes it is localized to only one dealer — such as was the case with Lehrman; sometimes it spreads throughout a whole city; sometimes it affects only a part of a city. As a consequence, this TCA may be reduced or increased; it may be extended to other Gulf dealers; or it may be withdrawn at once or in stages. (Tr. 464-467) This is the manner in which the wholesale price of gasoline fluctuates to meet changing market conditions.

Lehrman received his gasoline supply from the Gulf distributor in Groesbeck, Texas, some 18 miles away, who hauled it in his own trucks from small storage tanks at his bulk plant. The gasoline was delivered to the distributor at Groesbeck by Gulf transport trucks from large terminal tanks located on a pipeline at Dawson, Texas, a distance of approximately 25 miles. The gasoline reached the terminal storage tanks at Dawson through the pipeline which originated at Gulf's Port Arthur, Texas, refinery, where it was manufactured. (Tr. 387-393)

The fuel was not shipped to the terminal at Dawson against preorders; the inventory at the terminal was on a 30-45 day revolving basis; and the terminal supplied many distribution points in the vicinity as needs arose. (Tr. 390-393)

Although the crude oil from which it was made was produced 85% in Texas and 15% in Louisiana, the

gasoline, once it was placed in the pipeline, never left the State of Texas. (Tr. 388) The pipeline system originated at Port Arthur and extended north through Lufkin to Big Sandy, Texas. At Lufkin, there was a juncture which extended west through Dawson and Fort Worth on to Midland, Texas, where it terminated.

The entire pipeline facility is located wholly within the State of Texas, and no deliveries therefrom were made outside the State of Texas.

Improper evidence [question (c)]:

The cause of action pressed against Gulf is a Section 1 Sherman Act case based solely on the charge that Gulf coercively fixed the retail price of gasoline sold by Lehrman in Mart, Texas. The Robinson-Patman Act is not involved. There is no complaint of price discrimination. No charge was requested, nor was any given to the jury, regarding price discrimination. This issue simply was not in the case.

Yet, the Court repeatedly allowed testimony, over objection of Gulf, with regard to different and lower prices charged elsewhere, particularly in Waco (Tr. 32, 33, 44, 45), and circumstances that existed in the past at other Gulf stations in the Dallas-Fort Worth area (Tr. 248, 249, 283, 284), including documents pertaining to these foreign locations (Tr. 279), and refused to strike such testimony upon specific motion of Gulf (Tr. 280, 281). And all of this evidence was admitted notwithstanding the absence of Robinson-Patman and in face of the stipulations that Lehrman's competitors were confined to Mart and Harrison's Switch and he lost no business to any other Gulf station. (Stipulations 19, 20, App. p. 23)

Dallas-Fort Worth and Mart are located in different Gulf marketing districts (Tr. 166); the personnel differs; the Dallas-Fort Worth dealer dealt with Musgrove and Boatman from Fort Worth (Tr. 250); the Mart dealer dealt with Stokes and Lee from Tyler (Tr. 29); the Dallas-Fort Worth dealer had loan problems (Tr. 246), mortgage foreclosure (Tr. 258, 259), driveway difficulties (Tr. 255); the Mart dealer had no such complaints; the Mart dealer leased from Gulf (Tr. 27); the Dallas-Fort Worth dealer owned his own station (Tr. 246), had problems with price signs (Tr. 252), was allowed to "run out of gasoline" (Tr. 256).

The avowed purpose of all of this testimony was to demonstrate to the jury the so-called "harassing" tactics of Gulf used against the Dallas-Fort Worth dealer "designed to coerce him to do what they wanted him to do on prices" (Tr. 256). Even if this were true, and more, it does not prove coercion against the dealer at Mart.

Incorrect damages [question (d)]:

Over the objection of Gulf's counsel, the trial court allowed testimony from the witness Brown concerning the net profits which could be earned from a service station under various assumed and projected conditions (Tr. 339-343, 362). This was Lehrman's only witness on damages.

The entire testimony of Brown was based upon hypothetical conditions assumed by him, which had no bearing on or relation to the question of damage sustained by Lehrman. His projections of net profits were based on the records of another service station in Temple, Texas, some 45-50 miles away. (Tr. 337-338) Although he had available to him Lehrman's books and records, he did not

examine or attempt to analyze them in making his projections of net profits (Tr. 355-356). Lehrman reported a net profit of $1376 on gross income of $49,000 for the year 1964; yet, according to Brown's projection, an increase in gross sales of $8,500 would result in an increased net profit of $7000 (Tr. 359-360).

Although Brown testified that Lehrman's fixed expenses corresponded closely with the expenses of the service station he used to make his projections (Tr. 337, 356), his projections did not provide for any interest expense. Yet Lehrman deducted $456 on his tax return for the year 1964 (Tr. 357). Furthermore, Brown's projections made no allowance for cash shortages, even though Lehrman deducted cash shortages from his income tax returns for the years 1965, 1966, and 1967 (Tr. 94, 97, and 99).

Although Lehrman voluntarily gave up the service station in the middle of the term of his lease, without any coercion or threat from Gulf of any kind or character, the trial court's charge to the jury on damages, over the objection of Gulf's counsel, allowed the jury to assess and award Lehrman damages for the loss of future net profits (Tr. 519-533; 544-546).

Acting in complete disregard of the evidence adduced at the trial and the trial court's charge, the jury returned a verdict in favor of Lehrman in the amount of $60,000; and, in answer to the trial court's inquiry as to the meaning of the figure written by the jury foreman on the verdict form supplied by the court, the jury foreman replied: "We intended for that to be over a ten-year period." (Tr. 552) It is not readily apparent what ten-year period the jury had in mind. Lehrman contended that he was entitled to net profits for a ten-year period subse-

quent to the date he surrendered the service station premises, and the projections of Brown were based on a ten-year period; so it appears to be reasonable that the jury foreman was speaking of the future ten-year period.

After Gulf filed its motions for judgment N.O.V. and for new trial, the trial judge decided to reduce the jury's verdict to $21,000 (Tr. 556). This sum was determined by taking the average of $6,000 ($60,000 ÷ 10) per year found by the jury and multiplying it by three and one-half years (March 1, 1964, to October 1967), which is the period of time Lehrman operated the service station not barred by the statute of limitations (Tr. 545; 556-557).

This action by the trial court further compounded the errors in the charge on damages and in submitting the damage issue to the jury. There is absolutely no testimony of any probative value by which it can be determined that Lehrman was damaged in any amount during that three and one-half year period. Lehrman testified unequivocally:

"Q. All right, sir. Now let me ask you this, Mr. Lehrman: as far as '64 is concerned, do you think Gulf sold you the gasoline as cheaply as you thought they should?

"A. Yes, sir, no complaints.

"Q. No complaints, anything about '64 at all?

"A. No, sir." (Tr. 91, 92)

Yet, in the face of this testimony, the trial judge awarded damages in the amount of $500 per month, or a total of $5,000 for the ten-month period from March 1, 1964, through December 31, 1964.

The basis for federal jurisdiction in the court of first instance is the claimed violation of federal antitrust laws occurring in interstate commerce.

6. Reasons Relied on for Allowance of Writ

(a) The Court of Appeals, in holding that the coercive pricing of gasoline "as applied" against Lehrman occurred in interstate commerce or had a substantial and adverse effect thereon, is in direct conflict with a series of cases from other circuits, as well as its own, including:

Borden Co. v. F.T.C., 339 F.2d 953 (7th Cir. 1964);

Page v. Work, 290 F.2d 323 (9th Cir. 1961);
Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2nd Cir. 1964);

Belliston v. Texaco Inc., 455 F.2d 175 (10th Cir. 1972);

Las Vegas Merchant Plumbers Ass'n v United States, 210 F.2d 732 (9th Cir., *cert. denied*, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645, 1954);

Mitchell v. Livingston & Thebaut Oil Co., 256 F.2d 757 (5th Cir. 1958).

The rule is very clearly stated in *Page v. Work, supra,* at page 330:

> ". . . The test . . . is not that the *acts complained of* affect a business engaged in interstate commerce, but that the *conduct complained of* affects the interstate commerce of such business." (Emphasis supplied)

Again, this rule is stated in *Lieberthal v. North Country Lanes, Inc., supra,* at page 270:

> "To establish a violation of either Section 1 or Section 2 of the Sherman Anti-Trust Act Lieberthal was required to allege facts showing that the conspiracy had an impact on *interstate* commerce either because the *acts complained of* occurred in interstate commerce or because *those acts,* though occurring wholly on the local level, substantially affected interstate commerce." (First emphasis by the court, other emphasis supplied)

Furthermore, that the "acts complained of" must apply to a product in the flow of commerce is treated in *Page v. Work, supra,* p. 331:

> " . . . Appellant argues that when charges of price fixing and territorial division of a market exist at a local level on a product which never enters the flow of interstate commerce, nevertheless a per se violation of Section 1 has been made out, and that federal jurisdiction attaches, and that the amount of interstate commerce affected by such restraints is immaterial. The so-called qualitative test of the illegal per se doctrine does not itself operate to extend federal jurisdiction under Sections 1 and 2 *to purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce.*" (Emphasis supplied)

In this case, the "acts complained of" were the alleged coercive activities toward Lehrman. And they applied to pricing of a product which never left the State. The Court of Appeals said: ". . . we do not hold the TCA system bad 'on its face,' but only 'as applied' to Lehrman."

(b) In upholding jurisdiction, the Court of Appeals relies almost exclusively upon the decision of this Court in *Simpson v. Union Oil Company of California*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), which opinion it has completely misinterpreted and misapplied.

In the first place, interstate commerce was conceded in *Simpson*, as Mr. Justice Douglas at the outset of his opinion was careful to note:

> "The interstate character of Union Oil's business is conceded, as is the extensive use by it of the lease-consignment agreement in eight western States." (12 L.Ed.2d 98, 101)

As a consequence, jurisdiction simply was not an issue.

Also in *Simpson*, as the Court of Appeals pointed out, there was *documented* "price-fixing under a lease-consignment agreement which Union conceded was extensively used in eight Western states." In the course of the *Simpson* opinion, words such as "consignment," "consignment agreement," "consignment device," or "agreement" are used at least 22 times. In our case, there is no agreement; and the Court of Appeals has said that the TCA system is not bad " 'on its face,' but only 'as applied' to Lehrman."

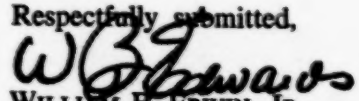
As a result, the holding of this Court in *Simpson* does not compel jurisdiction in *Lehrman*.

7. Conclusion

Wherefore, Gulf Oil Corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Fifth Circuit in the above-entitled case.

Respectfully submitted,



WILLIAM P. ERWIN, JR.
W. B. EDWARDS
Attorneys for Gulf Oil Corporation, Petitioner

CERTIFICATE OF SERVICE

I, W. B. Edwards, hereby certify that a correct copy of the foregoing petition for writ of certiorari was served on counsel for Kenneth Lehrman, Mr. Jack N. Price, P.O. Box 511, Longview, TX 75601, by depositing a copy of the same, postage prepaid, in the United States mail this 11 day of October, 1972.

APPENDIX

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29908

KENNETH LEHRMAN, Plaintiff-Appellee,

v.

GULF OIL CORPORATION, Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(March 15, 1972)

Before WISDOM and COLEMAN, Circuit Judges, and BOYLE, District Judge.

WISDOM, Circuit Judge: This appeal from a treble damage judgment under the Sherman Act raises questions of jurisdiction, liability, and the proper measure of the plaintiff Lehrman's damages. We affirm the judgment of the district court as to jurisdiction and liability, but reverse and remand for additional proceedings on the question of damages.

Gulf Oil Corporation took this appeal from a jury verdict and judgment of the United States District Court for the Western District of Texas awarding $63,000 plus costs and interest to Kenneth Lehrman, the operator of a now-defunct Gulf service station in Mart, Texas. Lehrman sued Gulf for treble damages under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that Gulf's complicated system of setting wholesale prices for its gasoline was used by Gulf as a mechanism for fixing the retail prices at which dealers resold Gulf gasoline. Gulf asserts that Lehrman voluntarily retired because he was not making enough money to continue in business. Lehrman complains that Gulf's pricing policies drove him out of business by making it impossible for him to engage in price competition with a neighboring self-service station run by Cape Oil Company, and with stations in Waco, Texas, near Mart. At the time of the trial he was a mail carrier. Both parties to the appeal complain of the district court's handling of the damages to be assessed against Gulf.

I.

THE FACTS

Lehrman opened his service station, leased from Gulf, in November 1959. It was the only service station handling Gulf gasoline in Mart, Texas, a small town in central Texas. For almost nine years he sold on the average between 8000 and 9000 gallons a month. See footnote 14.

From December 12, 1961, until August 16, 1964, Gulf openly fixed the resale prices for its gasoline, relying upon "consignment" agreements with its retail outlets as a means of avoiding the Sherman Act's per se ban on vertical

agreements not to resell except at a fixed price. The "consignment" charade came to an abrupt end in the wake of the Supreme Court's ruling in *Simpson v. Union Oil Co. of California*, 1964, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 298. Gulf then put into effect a "price support" system of wholesale distribution of its gasoline. That system was in effect at the time Lehrman's station went out of business in 1967, and the uncontroverted evidence at trial indicates that the price support system continues to characterize a substantial portion of Gulf's operations. This litigation requires us to analyze the compatibility of Gulf's price support system with the competitive dictates of our antitrust laws.

Gulf sells gasoline to its dealers at a "dealers tank wagon" ("DTW") price. That price is set from 4.5 to 5 cents lower than the prevailing retail price on the gasoline in question; the difference of 4.5 to 5 cents provides the dealer with his gross margin of profit on the sale of each gallon of gasoline. For example, if the retail posting on Gulftane were 29.9 cents, the "dealer margin" would be 5 cents per gallon and the DTW price would be 24.9 cents per gallon.

When other major oil companies in competition with a Gulf station lower their prices, a dealer requests Gulf to provide a "price support" in the form of a "temporary competitive allowance" ("TCA"), or reduction in the DTW price. After ascertaining informally that the competitor station's prices are as described by the Gulf dealer, Gulf grants the necessary TCA. For example, suppose that Texaco were selling its competitive gasoline for 25.9 cents per gallon in a location adjoining a Gulf station which had posted Gulftane at 29.9 cents. A 3.5 cent TCA

would be granted. If the dealer followed Gulf's "suggested" retail price, he would post Gulftane at 25.9 and absorb half a cent of the retail price cut, reducing his gross margin to 4.5 cents and the DTW price to 21.4 cents per gallon.

To understand Lehrman's necessary reliance on this system, we must add a further complication to the Gulf price support system — namely, Gulf's insistence upon differentiating the prices it will support in the face of a "private brand" and "self-serve" competition from the prices it will support to meet the competition of other major oil companies.[1] Gulf will support a price only to within a penny of a "private brander" and — directly relevant to this case — only to within two cents of a self-serve station. In other words, if Lehrman wished to price his gas at the precise level charged by the self-serve Cape Oil station in Mart, he might have done so, but would have been forced to absorb the two cent difference out of his own gross margin of profit — assuming, that is, that Gulf would not withdraw *all* price support from Lehrman if he dipped beneath Gulf's suggested retail price.

This outline of the TCA mechanism provides the background for the events which Lehrman alleges led to the failure of his service station business. Mart, where Lehr-

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1. As we remarked in a previous antitrust appeal involving retail petroleum distribution, "The line between a 'major' and a 'non-major' oil company or 'independent' is not well-defined. A major oil company is usually integrated in that it operates on the four functional levels of production, transportation, refining, and marketing. Generally, a non-major does not own its refinery, or if it does, the refinery is usually small. The non-major usually owns and operates its filling station." Sun Oil Co. v. FTC, 1961, 294 F.2d 465, 467 n. 2, *rev'd* on other grounds, 371 U.S. 505, 83 S.Ct. 358, 9 L.Ed.2d 466.

man's service station was located, is only twenty miles from Waco, a relatively large city with a number of major company service stations. Since many residents of Mart work in Waco, they may compare Mart prices with Waco prices and lighten competition between major company outlets in the two locations. Prices in Mart were consistently higher than those charged in Waco, but in 1964 Lehrman was able to compete with the Waco stations for a time because Gulf was granting him regular allowances to permit him to keep pace with the self-serve Cape Oil station in Mart which had opened in the late months of 1963.[2] Indeed, it appears from the record that Lehrman's chief concern with the self-serve station in Mart was as a vehicle to enable him to secure pricing competitive with dealers in Waco and Harrison Switch.

In early 1965 Durst, a Cape Oil representative, called Stokes, Gulf's district manager, and complained that Lehrman was posting Gulftane too cheaply — within a penny, and not two cents, of the self-serve station's prices. After this complaint from Lehrman's competitor, Gulf

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2. At the trial, Lehrman described his use of the TCA's during 1964 as follows:

A Well, during 1964 when the Save Station had come in, about, I would say, toward the latter part of the year, two or three different times, as the price was going down, if Gulf would support 26.9, I would post 24.9. This would enable — the Save would drop his down to 23, and the second call that I made to Gulf, I would tell them that he was 23, and they would authorize me to go to 24, and then I would put mine on 22, and then he would go to 21.

Q And what would happen when it went to 21?

A Well, he would — I would have to call one more time to get it down to where Save would go to 20.9, and I ended up on 21.9 on my Gulftane gasoline. That was the lowest that — Mr. Stokes said that was the lowest the Tyler District was authorized to go without a call to Houston, I believe.

never again granted significant price support to Lehrman.[3] The result was that his retail prices rose to two or three cents above those charged by the self-serve station, which were in turn higher than Waco prices. In short, after Durst complained that Gulf was granting TCA's enabling Lehrman to price his gasoline too cheaply, Gulf sharply curtailed its allowances to Lehrman. He could not compete with Waco stations and still pay the wholesale prices demanded of him by Gulf. In 1967, upon sustaining a sizable net loss, Lehrman went out of business.

II.

JURISDICTION

At the outset, we are met with Gulf's contention that the lower court lacked subject matter jurisdiction over

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3. Lehrman himself testified that after the conversation between Durst and Stokes he did not receive any more price support. Stokes, however, testified that Lehrman had continued to receive an allowance of .18 cents per gallon, even after Durst complained to Stokes about Lehrman's pricing policies. The .18 cents per gallon was apparently in effect throughout the Tyler area. Despite this qualification, Stokes did not deny that Gulf had severely restricted the amount and frequency of its TCA's to Lehrman in the wake of the Durst complaint. Stokes was asked whether Durst's complaint concerned him.

A. Yes, it was of concern when he told me that, because I could see I had been giving away Gulf's money down there pretty regularly.

Q. Now what do you mean by that, sir?

A. Granting allowances that were too large. I got to thinking about it.

* * *

Q. And so is that why you stopped granting the temporary competitive allowances that had previously been in effect for Mart?

A. What I stopped doing was granting allowances that would allow Lehrman a supported price of one cent above the self-serve.

this case. Gulf says that its actions of which Lehrman complains, neither occurred in commerce nor had a "substantial adverse effect on interstate commerce," and that Lehrman therefore failed to make out a valid claim under the Sherman Act.[4] In support of its position, Gulf points out that although the crude oil from which the gasoline was made was produced 85 percent in Texas and 15 percent in Louisiana, the gasoline sold to Lehrman was manufactured entirely in Texas and once placed in the pipeline, never left Texas. Lehrman sold so little gasoline compared with Gulf's Texas and American sales that Lehrman's sales and Gulf's relations with Lehrman had only a "de minimis" effect on interstate commerce.

Without so deciding, we assume Gulf is correct in its contentions that gasoline sold by Lehrman never moved in interstate commerce before Lehrman sold it and that his gasoline sales were small relative to Gulf's national and state-wide totals. By the same token, we take it to be true that Gulf's TCA system is in effect throughout much of the Southwest and that this system does have a significant effect upon the distribution of large amounts of gasoline, some of which, of course, moves in interstate commerce before it is sold as well as after. There is evidence in the record to support this propostion and none to contradict it.

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4. "Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal . . . ." 15 U.S.C. § 1.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

Lehrman has consistently asserted that the TCA system is a conspiracy or combination which goes beyond his own operation and far beyond the Mart-Waco area, and that this broad focus is the proper one for a jurisdictional determination in a treble damage action. Gulf, however, would have us concentrate for purposes of determining jurisdiction upon the volume of the business of the specific individual who complains of antitrust violation. The jurisdictional problem in this case, then, reduces to whether a business practice with an undeniably powerful effect on interstate commerce may be the subject of a treble damage suit by a single victim of the practice whose own operation is relatively small and whose own effect on interstate commerce is insignificant.[5]

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5. We do decide as a secondary ground for jurisdiction that Lehrman's business did have a substantial impact on interstate commerce. Lehrman's station sold not just gasoline, but tires, batteries, and accessories as well. When the failure of the gasoline operation forced Lehrman to discontinue his entire business, the "TBA" portion of his business went under as well. We take judicial notice that many of the TBA items in Lehrman's stock were products which had moved in interstate commerce, and which did not, as Lehrman's gasoline evidently did, originate in Texas. We therefore conclude that the demise of Lehrman's business had an appreciable impact upon the flow of TBA goods from states where such goods are manufactured into Texas. The effect was appreciable because, while small relative to total Gulf TBA sales, the gross amount of such sales would be significant over the extended period of time Lehrman might have been able to continue in business.

In addition, we think there would be substantial basis for holding that sales of a commodity so closely related to interstate highway travel as gasoline invariably occur *in* interstate commerce. With the isolated exception of agricultural and service roads, the highways of our nation increasingly form an integrated transportation "system" which carries people and goods among all the states. Gasoline stations located on our highways are, in a very practical sense, facilities *of* interstate commerce, much like a highway motel. See Heart of Atlanta Motel v. United States, 1964, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258. As such, the effect of a gasoline station's sales on interstate commerce is substantial *per se*, or at least presumptively substantial.

The issue is not novel. The Supreme Court considered the same question in *Simpson v. Union Oil Co., supra,* where a single gasoline station operator successfully complained of price-fixing under a lease-consignment agreement which Union conceded was extensively used in eight Western states. Without any discussion of the volume of Simpson's own business, the Court had no trouble finding jurisdiction. It stated, though without elaboration, that "there is actionable wrong whenever *the restraint of trade or monopolistic practice* has an impact on the market; and *it matters not* that the complainant may be only one merchant". 377 U.S. at 16, 84 S.Ct. at , 12 L.Ed.2d at 102 (emphasis added). *Cf. Klor's v. Broadway-Hale Stores,* 1959, 359 U.S. 207, 213, 79 S.Ct. 705, 3 L.Ed. 2d 741, 745.

Simpson is arguably distinguishable from this case because Simpson's gasoline may well have originated outside California. But we decline to read that case so restrictively in light of its forthright language. Instead, we read *Simpson* as a holding on all-fours with this case — a holding with an unshakable, constitutional foundation and a firm statutory justification. We begin with the constitutional dimension of the *Simpson* jurisdictional holding.

Interstate commerce "is a practical conception", and as a result "interferences with that commerce must be appraised by a judgment that does not ignore actual experience". *NLRB v. Jones & Laughlin Steel Corp.,*

And that presumption cannot be defeated by a showing that the magnitude of a station's trade is small relative to the total volume of interstate trade. For if it is "interstate commerce which feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Mfgs. Ass'n, 1949, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805, 811.

1937, 301 U.S. 1, 41-42, ____S.Ct.____, 81 L.Ed. 893, 914. A wide ranging business practice of the kind protested by Lehrman — like that protested by Simpson before him — undoubtedly affects the nation's commerce. As such it is within the power of Congress to regulate; and the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement". *The Daniel Ball*, ____, 10 Wall. 557, 564, 19 L.Ed. 999, 1001. Among the tools at the disposal of Congress in regulating practices which it believes to have an adverse effect upon commerce is the principle that judicial remedies are proper if they are conducive to detecting, punishing, and deterring undesirable practices. Congress might have vested in the Executive branch exclusive power to sue antitrust violators, thereby requiring any single individual aggrieved by a widely-used practice which affects commerce to enlist government support in prosecuting a lawsuit to end the practice or to punish and deter its commission in the future. But Congress has explicitly authorized the treble damage action by aggrieved private persons as a supplement to judicial action initiated by the Executive branch. The treble damage action is therefore a constitutional exercise of the commerce power even when a single treble damage plaintiff has no appreciable impact on interstate commerce, because the requisite nexus under the commerce power is that between the practice sought to be regulated and the flow of interstate commerce. The treble damage action is, in effect, a form of Congressional regulation less restrictive than direct government litigation aimed at a business practice as a whole. If the one is constitutional, the other is, too.

There being no constitutional barrier, there remains only the statutory prerequisites to jurisdiction over an action by a treble damage plaintiff injured by a practice with a substantial impact on interstate commerce. The present case was brought by Lehrman under Section 1 of the Sherman Act, which proscribes "every contract, combination, . . . or conspiracy, in restraint of commerce among the several states . . ." 15 U.S.C. §1. Lehrman alleged a conspiracy between Gulf and its myriad dealers — including himself — and Cape Oil as the basis of his complaint. Gulf denied that its TCA system should be characterized as a "conspiracy", and asserted that it was instead a legitimate business practice of Gulf to meet changing market conditions in the various portions of its chain of distribution. Gulf also denied that the TCA system operated "in restraint of trade". But Gulf never denied that the TCA system was a far-reaching business practice which, in all, had a substantial effect on interstate commerce — for better or for worse.

Apparently, then, Gulf would have us deny jurisdiction to sue for treble damages under the Sherman Act even though Lehrman's complaint alleged a "combination . . . in restraint of trade". Gulf would have us deny jurisdiction despite the uncontested breadth of the practice and its uncontested effect upon commerce — simply because Lehrman's own share of that interstate commerce is small. But we reject this interpretation of the treble damage mechanism as an interpretation at war with the underlying purpose of the treble damage action. As Judge Rives has stated for this Court, "The grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which would help enforce the anti-

trust laws and therefore make them more effective." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 1954, 214 F.2d 891, 893. That purpose would surely be limited if only those injuries already most likely to come to the attention of Government enforcing authorities — those injuries with a substantial independent effect on interstate commerce — would form an appropriate basis for a treble damage suit. It is far more compatible with the statutory purpose to cast treble damage plaintiffs, whatever the magnitude of their own personal injuries in the role of early detectors of anticompetitive practices. Moreover, the statute plainly suggests that the individual plaintiff's harm is not the jurisdictional standard, but is only the weathervane for indicating the possibility of broader injury to the nation's commerce; that statute authorizes the treble damage action "without respect to the amount in controversy." 15 U.S.C. § 15.

To summarize: a treble damage complaint "must allege facts from which it can be determined that the *conduct* charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public flow of interstate commerce." *Kinnear-Weed Corp. v. Humble Oil & Refining Corp., supra* at 894 (emphasis added). When, as in Lehrman's case, the offensive conduct is part of a broadly-utilized business practice having a significant effect on interstate commerce, the "conduct" which must be "reasonably calculated to prejudice the public flow of interstate commerce" is the conduct of that broadly-utilized business practice and not just the defendant's conduct towards the individual plaintiff. *Simpson v. Union Oil Co. of California, supra.*

III.

LIABILITY

We turn now to the question whether Gulf's actions constituted "a contract, combination . . ., or conspiracy in restraint of trade." The applicable legal framework is well defined.

Any vertical agreement, express or implied, having the effect of pegging or stabilizing prices in the retail market is a substantial threat to the policies of free competition which inspired the Sherman Act. An illegal combination to fix prices results whenever a seller suggests retail prices and secures compliance by means in addition to the "mere announcement of his policy and the simple refusal to deal" if the policy is not complied with. *United States v. Parke, Davis & Co.*, 1960, 362 U.S. 29, 44, 80 S.Ct. 503, 4 L.Ed.2d 505, 515. The federal court have not hesitated to pierce the subtleties and complexities of resale price maintenance schemes; "a supplier may not use coercion on its retail outlets to achieve resale price maintenance and it matters not what the coercive device is." *Simpson v. Union Oil Co. of California, supra*, 377 U.S. at 17.

Lehrman's complaint alleged that he was denied price support — punished — when he refused to follow Gulf's suggested retail minimum prices on gasoline. On either of two theories, Lehrman' complaint provided the jury with a basis for finding that Gulf's conduct towards Lehrman constituted an unlawfully coercive effort to secure compliance with Gulf's "suggested" retail prices. One theory is that Gulf conspired with Lehrman's competitor Durst and with Cape Oil Company generally to deny Lehrman

further price support in an effort to force Lehrman to adhere to its suggested prices in the course of his future operations, should price support ever be resumed in his favor, or even if it should not. This theory would characterize the withdrawal of price support as designed to teach Lehrman a lesson and to bring him back into line.

Alternatively, Gulf's withdrawal of price support for Lehrman may have been designed to convey a message to Gulf's other retail dealers or to Gulf's competitor Cape Oil Company or to both. If this theory formed the basis of Lehrman's complaint, the allegation would be that Gulf conspired with Cape Oil and with other Gulf retailers to deny Lehrman price support, with no intention of ever again helping to restore Lehrman to a competitive position in his market by use of the TCA system. According to this theory, Gulf was indifferent to Lehrman's own plight and denied price support to him for the purpose of demonstrating to other Gulf dealers the ramifications of any refusal to adhere to Gulf's prices, and for the purpose of reassuring Cape Oil of its resolve to stabilize the prices charged by Gulf dealers relative to those charged by Cape's self-serve stations. Either legal explanation for Gulf's behavior would support, a jury verdict in Lehrman's favor.[6]

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6. We think it appropriate to add a word about the relevance of Gulf's motivation in denying price support to Lehrman. Few business practices are anticompetitive on their face; whether or not such practices square with the antitrust laws often depends on how the practices are used in day-to-day business operations. It is usually difficult for a court or a jury to cut through the rhetoric with which litigated business practices are described, and thereby to arrive at a reliable sense of the everyday significance of the practice in question. The circumstances surrounding the use of a particular business practice give strong clues as to what those who employ the practice hope to accomplish by it, and what those individuals hope to accomplish may

Gulf's apparent position in defense of its behavior is that a supplier, in a competitive economy, must be free to set those wholesale prices for his product which the market dictates. A supplier must be free to set competitively determined wholesale prices even though those prices necessarily have a strong effect upon the price which retailers may set for their own sales of the product. To choose an obvious example: it is undeniable that the wholesale price, set by the supplier, establishes a floor beneath which the retailer's price cannot fall if he is to continue to make a profit. Thus the bare fact of correlation between wholesale and retail price is not necessarily an indication of illegal vertical price restraint.

Similarly, or so Gulf's argument might continue, it is not inimical to competition for a supplier to vary his wholesale prices in a good faith effort to allow his retailers to respond to varying price competition at the retail level. Such variations in wholesale prices may reflect the supplier's knowledge of competitive conditions in the retail market and enable the supplier to evaluate more accurately the demand for his product, in turn, determined to a large degree by the needs of retailers who function as buyers in the wholesale market. And, of course, if the wholesaler is behaving competitively when he varies his prices with changing retail price conditions, he must insure that his own price concessions are based upon accurate information about price conditions in the retail market. To this end, Gulf's position might con-

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shed light on whether the practice does in fact have the hoped-for, but anti-competitive, effect. In short, when a firm displays an anti-competitive animus in the operation of an otherwise ambiguous business practice, what the firm seeks to accomplish provides as sure an indicator of the actual effect of the practice on competition as can be found in the shifting sands of antitrust litigation.

clude, it is appropriate and understandable that a supplier granting price supports concern itself with the price charged by his own retailers and by retailers of competing produces — for there is no more accurate way to define retail price conditions than by the actual marketplace behavior of the retailers themselves. Arguably, then, there is nothing anticompetitive about varying wholesale prices with retail competitive conditions, and there is nothing anticompetitive about retracting a wholesale price concession when investigation reveals that it was based upon misinformation about retail price conditions.

Whether or not we would choose to accept this characterization of the TCA system as it was applied to Lehrman, our task on this appeal is more confined. The jury agreed with Lehrman that adherence to a suggested price schedule was the *quid pro quo* for Lehrman's receiving Gulf's TCA's. The jury agreed with Lehrman that the effect of the TCA system was to restrict the flexibility of Lehrman's retail prices and not to facilitate flexible responses by Gulf to the volatile retail gasoline market. We must decide whether the evidence was insufficient to support that finding — whether "the facts and inferences point so strongly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict." *Boeing Co. v. Shipman*, 5 Cir. 1969, 411 F.2d 365, 374. Viewing the evidence in a light favorable to Lehrman, as we must, we hold that there was ample evidence from which the jury might have inferred that Lehrman's TCA's were conditioned upon his adherence to prices "suggested" by Gulf, and the TCA's were withdrawn from Lehrman for anticompetitive reasons when he refused to follow Gulf's price list.

The key evidence, of course, was the testimony indicating that Gulf discontinued support for Lehrman's prices when Durst complained that Lehrman was charging a penny too little for each gallon of Gulftane. Although some reasonable persons might attribute no punitive motivation to Gulf's decision to withdraw price support from Lehrman after Gulf received Durst's complaint, we cannot say that it would be impossible to conclude otherwise. It was not unreasonable for the jury to find that Gulf insisted on adherence to the company's prices as a means of achieving price stabilization among its outlets and between its outlets and those of the Cape Oil Company in Texas.

A second source of support for the jury's verdict was the evidence that Gulf "suggested" specific retail prices to be applied at each TCA level. A jury might find these suggestions strange for a supplier who was granting a particular amount of price support on the theoretical ground that it already knew what price retail competition would force its dealer to charge. The "suggestions" had strong overtones of redundancy when considered in light of the only tenable justification for the TCA system as a whole. The jury might well have decided that the specificity of the price suggestions, coupled with the economic significance of the TCA's to retailers, were calculated not to facilitate retail pricing decisions but rather to imply that adherence to the "suggested" prices and the granting of price support went hand in hand.

A third basis for the jury verdict emerges from the evidence that Gulf unabashedly fixed Lehrman's prices through a "consignment" agreement until such agreements were held unlawful by the Supreme Court in 1964. In light of the other evidence supporting its verdict, the jury

might have been persuaded that Gulf's elaborate TCA system was a subtle means of achieving what formerly was accomplished through open price-fixing. We do not place great stress on this historical factor, and were there a complete absence of other supportive evidence we might hesitate to uphold the jury's verdict on account of history alone. But as a part of the total picture which the jury considered, Gulf's past practices were relevant to the issue whether Gulf price supports were a vertical price fixing scheme in disguise.

At the trial, Gulf introduced no evidence to prove that Durst's complaint to Stokes was causally unrelated to Gulf's decision to cut off Lehrman's price support. Instead, the only justification for the cut off which emerges from the record is that proferred by Stokes himself: he refused to grant Lehrman further price support after Durst complained because Lehrman's low prices proved that Gulf's price support money was being wasted.[7] Whatever the merits of this justification for Gulf's behavior, it was open to the jury to reject it. The jury did reject it. Nevertheless, we feel that it is appropriate to explain why we do not believe that Stokes' explanation for cutting off Lehrman's price support upon Durst's complaint will withstand analysis.

We accept *arguendo* the assumption underlying Stokes' testimony; that generally the TCA system was designed to enable Gulf to respond through its wholesale prices to competitive conditions in the retail market. But only a very limited form of retail price policing promotes competition even if we agree that the wholesaler is entitled to some assurance that his price concessions are really needed by the retailer. The supplier has a legitimate in-

7. See note 3, *supra*.

terest in satisfying himself that: a) retailers of competing brands are charging no *more* than the price which they have been represented as charging; and b) retailers of the supplier's own product are charging no *more* than the price they have represented as being competitively necessary and as requiring wholesale price support. The supplier must ascertain the prices charged by competing retailers to insure that his dealer's view of the prevailing price competition is accurate. He must ascertain the price actually charged by his own retailer after support is granted to insure that the dealer is not pocketing the price support instead of passing it on to consumers through lower retail prices which presumably would mean more effective retail price competition and increased demand reflected at the wholesale level.

Yet, despite Gulf's protestations to the contrary, there is no comparable justification for conditioning wholesale price support upon adherence to a schedule of *minimum* retail prices. When a dealer sets his retail prices at a given level, that level is a reliable indicator that market pressure dictates the price. Retail prices lower than those expected by a wholesaler when he grants wholesale price support reflect either the retailer's willingness to maintain a reduced gross margin of profit in hopes of higher sales volume, or the insufficiency of a particular level of wholesale price support. They do not reflect, as Gulf maintains, the excessiveness of the price support, for the wholesaler has no more right to dictate to the retailer an appropriate margin of profit on retail sales than to set his retail prices outright. If anything, when Gulf discovered Lehrman setting retail prices below its expectations for a particular amount of price support, Gulf would have investigated to see whether Lehrman needed additional price support.

were Gulf truly concerned with keeping Lehrman competitive.

There is one additional sense in which Gulf's price support to Lehrman might be characterized superficially as "excessive". This is on the ground that Lehrman was selling Gulf gasoline for less than Gulf expected him to sell it when Gulf granted the wholesale price support. Arguably, price support for Lehrman was excessive because it enabled him to plunge both himself and his self-service competitor into a price war — a price war which foreseeably would result in Gulf's having to make unprofitable, below-cost sales to Lehrman if it wished to keep Lehrman alive. Although this explanation for Gulf's behavior probably cuts close to the heart of the matter, it would not — even were we freed from the jury's verdict to decide this case ourselves — save Gulf from the dictates of the Sherman Act's per se prohibition of resale price maintenance. The argument amounts to a confession that Gulf has an interest in conditioning price support upon resale price maintenance because free competition among retailers might generate further dealer pressure on existing wholesale prices. We cannot accept this argument. Resale price maintenance schemes are "unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness . . ." *United States v. Sealy*, 1967, 388 U.S. 350.

A supplier need not grant any wholesale price support to its retailers, whether it calls that price support a "temporary competitive allowance" or attaches some other label to the concession. But if the supplier does grant price support, and if price support is as crucial to the

retailer's success as it is to a gasoline retailer's, the supplier cannot withdraw or substantially reduce price support simply because a retailer chooses to reduce his gross margin of profit and sell the product at retail for less than the supplier suggested, expected, or desired.

IV.

THE ADMISSION OF EVIDENCE

In addition to questioning the sufficiency of the evidence to support the jury's verdict, Gulf contends that the admission of certain evidence not directly related to Lehrman's own business dealings with Gulf undermined the integrity of the jury's verdict and requires us to remand for a new trial. First, Gulf assigns as error testimony admitted over its objection concerning the prices charged for gasoline in Waco. Gulf complains of the testimony regarding prices in Waco because it says Lehrman stipulated that his competitors "were the service stations located in Mart, Texas, and the three service stations located in Harrison's Switch (Hallsburg), Texas."[8] Both at trial and in this Court Gulf has urged that this stipulation be read as one which stated that the relevant market in which Lehrman competed was limited to the Mart area. But counsel for Lehrman deny, both here and at trial, that the ambiguous words of the stipulation conceded that Lehrman competed *exclusively* with the Mart and Harrison Switch stations.[9] We agree. In overruling

8. The full text of stipulation number 19 is as follows:
19. Plaintiff's competitors were the service stations located in Mart, Texas, and the three service stations at Harrison's Switch (Hallsburg), Texas, which were located 8-9 miles from Mart, Texas.

9. The colloquy is reported as follows in the official transcript:
Q Mr. Lehrman, were there Gulf Stations in Waco that were selling at a price below which you were selling during the

Gulf's objection, the district judge implicitly accepted Lehrman's interpretation of the stipulation, or at least refused to hold Lehrman to the stipulation that he was not in competition with some Waco stations. Despite the ambiguous stipulation, then, it was not error to admit testimony concerning prices in Waco. Lehrman introduced testimony, never controverted, that many of Lehrman's customers worked in Waco and bought gasoline there, and were therefore in a position to be diverted away from Lehrman by lower prices in Waco. After this testimony established that Lehrman and the Waco stations were in direct competition, evidence of price discrepancies between Mart and Waco was properly admitted to demonstrate the impact of Gulf's pricing policies on Lehrman's ability to carry on his business.

Gulf also complains of the admission of the testimony of Duane McDonald and G. B. McDonald, both of whom

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period that you operated the station in Mart?

MR. ERWIN: Your Honor, we object to that. That goes directly to the question of whether or not there is price discrimination, and that has nothing to do with this case. It is completely irrelevant to the issues here.

MR. PRICE: It has to do with the price-fixing structure.

MR. ERWIN: It doesn't have anything to do with the price that we sell to Mr. Lehrman, if they are not in competition with each other, and there is no allegation of price discrimination, and so it is completely irrelevant and immaterial.

MR. PRICE: Your Honor, of course, we contend that they are in direct competition, and I think the evidence proves it. I don't think there will be any to disprove it.

MR. EDWARDS: Besides that, Your Honor, we have a stipulation with regard to the market area being confined solely to Mart, and that is in the pre-trial order, also . . .

THE COURT: Is there a stipulation that the market is limited to the Mart area?

MR. PRICE: I have made no such stipulation, Your Honor.

THE COURT: The objection is overruled.

testified as to their experiences as Gulf dealers in the Dallas-Fort Worth corridor. This testimony, says Gulf, was irrelevant; what took place in the Dallas-Fort Worth area had no bearing upon Gulf's dealings with Lehrman in Mart, since "price fixing or coercion if proved by one dealer at the end of Main Street does not prove that price fixing was practiced at the other end of Main Street, much less in two stations located hundreds of miles apart." But Gulf confuses the relevance of a piece of evidence with its sufficiency to prove a contested proposition of fact. The McDonalds' testimony was relevant, although perhaps not sufficient had it stood alone. It was relevant because it showed that Gulf had previously indicated by its behavior a concern with stabilization of its retailers' prices in the Texas market, and evidence is relevant if it has "any tendency to make the existence of [a controverted proposition] more probable . . . than it would be without the evidence." Rule 401, Proposed Rules of Evidence for the United States Courts (Rev. Draft, March 1971). We repeat: the testimony was relevant because it made the proposition sought to be demonstrated more likely of belief than it would have been in the absence of the testimony, *even though* the McDonald's testimony alone would not necessarily make the proposition more likely to be true than untrue.

Gulf also ignores the predicate which Lehrman established for the testimony of the McDonalds. At the time of trial, Stokes was a sales director for Gulf, with responsibility for eight districts in the Southwest, covering three states. He had been district manager of the Tyler District (which included Mart and Waco) from 1960 to 1967. Stokes testified that Gulf's TCA pricing system was employed throughout the districts of the three states over

which he had jurisdiction. He responded affirmatively a second time when asked if Gulf's pricing system was the same throughout all the areas of which he had knowledge.[10] Stokes' testimony, then, established rough uniformity between the business practices of Gulf in Mart and those testified to for the Fort Worth-Dallas area by the McDonalds. This uniformity, though of course there are significant differences in the two areas, was enough to make the McDonalds' testimony at least relevant with-

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10.

Q. Well, now, we started on the explanation of the pricing system but, first, let me ask you, has it been the same basically down in the Beaumont area when you worked there?

A. Now, what are you asking was the same?

Q. Whether the pricing system was basically the same, what you started to explain about support and assistance and so forth, has the basic system been the same during all of these years you have worked for Gulf in these different areas?

A. When I was in Beaumont I didn't know what the pricing system, as you call it, is, and I never had anything to do with pricing.

Q. Well, when you moved to Fort Worth in the 'fifties, since that time has it been basically the same?

A. To my knowledge, the tank wagon prices have remained relatively level, and we grant support in the same manner we have been doing for several years.

Q. And as far as you know, all of the areas in which you have had any personal knowledge or contact, it is basically the same, and still is today?

A. Now, what are you referring to now?

Q. This basic pricing system.

A. I don't know what you mean by the pricing system. You keep getting to this, but I am with you in saying I haven't seen any changes, but I still don't know what you mean—

Q. By pricing system?

A. —by "system."

Q. Well, whatever the system is, and I am going to get into that in a little bit, in just a minute, Mr. Stokes, but it has remained basically the same, and it is basically the same throughout all areas that you have knowledge of?

A. Yes.

in the very broad confines of the definition mentioned above.

Perhaps, then, Gulf's real quarrel with the admission of the McDonald's testimony is not with its relevance, but rather with its tendency to prejudice the jury against Gulf. But we cannot say the lower court erred in its balancing of the probative need for and value of the McDonald testimony against the possible prejudice to Gulf resulting from its admission. Weighing these values is a delicate task which the trial judge, in his intimate familiarity with the proceedings, is better suited than we to accomplish. The trial judge might well have thought it crucial to the jury's understanding of the case that evidence be heard from other retailers who had dealt with Gulf; in the absence of such testimony, the jury might easily have concluded that Lehrman was an eccentric who was one in a million Gulf station owners to complain of Gulf's pricing practices. It would no doubt be difficult to produce a qualified witness from the Mart-Waco area, since Gulf dealers still in business would be understandably reluctant to testify against Gulf; indeed, other dealers might well have been content with the price stabilization facilitated by the TCA system. Moreover, upon Gulf's objection, the trial court excluded testimony of the McDonalds that might be considered inflammatory. In the circumstances, we see no reversible error affecting the substantial rights of the parties in admitting the McDonalds testimony. Because we also believe there was no error in admitting testimony concerning the price of gasoline in Waco, we hold that the lower court's judgment on liability was supported by sufficient evidence and that it must stand.

IV.

DAMAGES

Also at issue on this appeal is the method used by the trial court in calculating the damages to be awarded Lehrman. The jury was asked to determine, from a general instruction,[11] the quantum of damages sustained by

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11. "In determining the damages, if any, that the Plaintiff sustained as a result of a violation, if any, of the Antitrust Law, you are to be governed by the following instructions:

The terms "business" and "property," as used in the Antitrust Laws, signifies that which habitually busies or engages time, attention or labor as a principal serious concern or interest. Our law permits the jury to take into account both any damages which may have been inflicted on existing property and the damages which may have been sustained as a result of being unable to make profit which reasonably could have been anticipated and would have been realized if it were not for the violation of the Antitrust Laws, if any such violation occurred. But you are instructed that it must first be determined that any conspiracy which may or may not have existed was a substantial, identifiable cause of the damage, if any, to the Plaintiff.

In a suit alleging a violation of the Antitrust Laws, in order for the Plaintiff to recover, he must prove that the violation was an identifiable, direct and substantial cause of the damage which he sustained. The Plaintiff then must satisfy you that the damage, if any, which he suffered, was as a fact attributable to the conspiracy, if any there existed. But while the Plaintiff has the burden of showing that any damage which he may have sustained was the result of the violation, he would not have to prove with exact mechanical accuracy the extent of the damages; however, the damages alleged must be established by a preponderance of the evidence as a direct and identifiable result of a violation of the Antitrust Laws. In other words, the Plaintiff must satisfy you that the damages, if any, would not have occurred but for the violation, if any.

In this case you are instructed that you cannot award any damages, if any, that may have occurred prior to March 1, 1964.

In considering the element of future profits in determining what damages, if any, were sustained by Plaintiff, you are instructed that if because of a conspiracy the Plaintiff was unable to earn net profits which would in reasonable probability have accrued to him but for the conspiracy, then, Plaintiff was in fact damaged. Future profits mean net profits, and are determined by subtracting the cost and expense of a business from its gross revenue.

Lehrman as a result of the anticompetitive practices of Gulf. The jury was authorized to find that Lehrman was damaged by the amount of any future net profits which did not accrue to him which would have accrued to him in reasonable probability but for the conspiracy of which Lehrman complained. The trial court cautioned the jury not to base any calculation of future profits upon speculation or "sheer guesswork", but only upon "a just and reasonable estimate of damage based on the relevant evidence." The relevant evidence, according to the trial judge's charge, included "the past history and net profits of the business, the experience and competence of the plaintiff in the filling station business, the competition which the plaintiff would have had in and around Mart, Texas, and the general market conditions in that area." The jury returned a verdict of $60,000 in Lehrman's favor, and when asked, the foreman explained that the $60,000 sum was intended to cover a ten-year period. The district court set aside this verdict and entered judgment for Lehrman in the amount of $21,000 trebled ($63,000) plus costs and interest. In so doing, the court explained that it was reducing Lehrman's damages from a period of ten years' duration to one of only three and a half years — the period from 1964 to 1967 during which Lehrman operated his Gulf station as a lessee.[12]

You are instructed that you may consider in determining whether or not any part of Plaintiff's damages constitute future net profits the past history and net profits of the business, the experience and competence of the Plaintiff in the filling station business, the competition which the Plaintiff would have had in and around Mart, Texas, and the general market conditions in that area. You may not base any findings of damages on sheer guesswork, but must make a just and reasonable estimate of damage based on the relevant evidence."

12. THE COURT: The Judgment is ordered in the amount of — ordered for the Plaintiff in the amount of $21,000.00. The jury, you

Gulf raises several objections to the damage calculation. First, it objects to the use of future profits as a measure of Lehrman's damages because, it contends that allowing Lehrman to recover for future profits would enable a proprietor who has been the victim of a single anti-competitive practice to walk away from his business and collect damages for future profits despite the possibility that the business might still be operated successfully. Gulf stresses that the cases which have allowed future profits as a measure of antitrust damages have been cases involving refusals to deal, or cancellation of leases, both of which practices rendered it impossible for the proprietor who had been damaged to continue in business.[13]

We do not accept Gulf's restrictive application of the principle of future profits as antitrust damages. When a practice condemned by the Sherman Act puts a small operator out of business, we do not think it matters whether the antitrust violator directly closes down the small proprietor or whether he takes anticompetitive steps which foreseeably will result in the proprietor's demise if

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will recall, stated in their findings that they based the computation of the damages under the charge at a rate of $6,000.00 per year. The evidence showed that the actual tenure — and if I am wrong about this, you gentlemen correct me — the actual time that the Defendant — that the Plaintiff spent in the station as lessee-dealer, or whatever he is, was three and half years; is that correct, three and a half years?

MR. PRICE: That is as I recall it, Your Honor.

THE COURT: All right. That is why the judgment is entered in the amount of $21,000.00. Motion for modification or for judgment n.o.v., that is not a correct motion, either, that is, in response to the motion n.o.v., but the damages are modified to that extent, $21,000.00.

13. E.g., Lessig v. Tidewater Oil Co., 9 Cir. 1964, 327 F.2d 459, 465; Osborn v. Sinclair Refining Co., 4 Cir. 1963, 324 F.2d 566.

carried on for a sufficient amount of time. Nor are we persuaded by Gulf's prediction that the awarding of future profits in this context licenses the victims of single antitrust violations to abandon their still-thriving businesses in order to cash in on the bonanza of a future profits judgment. The facts of the present case give no hint that Lehrman abandoned a successful gas station in the hopes of securing a large judgment in his favor. After 1965, Lehrman struggled along until finally it was clear that the station was not worth his while.[14]

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14. The record reveals the following key statistics for Lehrman's business.

GASOLINE GALLONAGE		
1960	102,219	
1961	100,524	
1962	106,444	
1963	107,404	
1964	128,750	
1965	103,107	
1966	81,417	
1967*	62,727	*(nine and one-half months)
TOTAL SALES (rounded to next dollar)		
1960	$41,344	
1961	39,103	
1962	39,345	
1963	43,831	
1964	48,985	
1965	46,338	
1966	38,301	
1967*	28,480	*(nine and one-half months)
NET PROFIT [or (LOSS)]		
1960	($1015)	
1961	690	
1962	(2971)	
1963	(78)	
1964	1376	
1965	1105	
1966	1295	
1967*	(2322)	*(nine and one-half months)

Gulf also protests the "speculative" testimony of Ernest Brown and urges us to hold this testimony an inadequate basis for assessing Lehrman's damages. But Gulf merely protests application of the familiar rule that a wrongdoer is responsible for uncertainty in calculating the damages proximately caused by his own wrongdoing. On the facts of the present case, there was evidence from which a jury might conclude that Gulf's decision to punish Lehrman by means of its TCA system for his failure to abide by Gulf's system of "suggested" prices caused the demise of Lehrman's station. Once it is apparent that damages must be assessed so as to approximate the future profits of a business, a court and jury necessarily enter into the realm of the imprecise and the uncertain. Particularly is the calculation of damages difficult when the future profits of an enterprise as young as Lehrman's must be determined, since there is no reliable track record to look back on. But uncertainty cannot end the efforts of the federal courts to redress the harm caused proprietors by violations of the freedom of the market-place. The wrongdoer must bear the risk of the uncertainty in measuring the harm he causes. *Bigelow v. RKO Radio Pictures, Inc.*, 1946, 327 U.S. 251, 265; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 1931, 282 U.S. 563-66. The Supreme Court has recently reminded us that "[t]rial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible for the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 1969, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129, 148.

In characteristically forthright language, Mr. Justice Black addressed himself to the very problem before us when the *Simpson* case found its way back to the Supreme Court, after remand, on the issue of damages. We quote Mr. Justice Black's explication of the *Bigelow* rule:

> Antitrust damages such as those involved here are bound to be "speculative" and "conjectural" to some extent. When a person wrongfully takes government bonds worth $10,000 on the market, the damages can be precisely measured. But when as here a young man's business is wiped out root and branch by a wrongdoer, the measurement of the victim's damages is not so simple a matter. This is true because no one can infallibly predict how long that business would have continued to grow and flourish or precisely how much the business would have been worth to him in 25 years. But certainly a fair and just legal system is not required by difficulties of proof to throw up its hands in despair and leave the sufferer's damage to be borne by him while the person who did the wrong goes scot free. This Court has refused under such circumstances to hold that our system of justice is so helpless to do justice. In this very antitrust field our Court has specifically and pointedly refused to permit antitrust violators to escape liability for their wrongs on the argument that damages must not be awarded because they are uncertain and speculative.

Simpson v. Union Oil Co., 1969, 396 U.S. 13, 16, 90 S.Ct. 30, 24 L.Ed.2d 13, 16 (Black, J., concurring and dissenting).

In short, the law is clear: the courts are to take a charitable view of the difficulties of proving damages in a case when a treble-damage plaintiff must try to prove

what would have accrued to him in the absence of the defendant's anticompetitive practice. *Cherokee Laboratories, Inc. v. Rotary Drilling Service, Inc.*, 5 Cir. 1967, 383 F.2d 97, 106. But this tolerant view is limited by our responsibility not to allow damages to be determined by "guesswork" or "speculation"; we must at least insist upon "a just and reasonable estimate of the damage based on relevant data." *Bigelow, supra*, at 327 U.S. 264. *Poster Exchange Inc. v. National Screen Service Corp.*, 5 Cir. 1970, 431 F.2d 334, 338. We must continue to be sure that damage awards of the kind involved in the present case meet the basic requirements of coherency and consistency which any lawyer expects of an ordinary recovery on, say, contractual expectations, perhaps the most analogous problem of damage calculation to the one before us today. We are unable to find the requisite degree of coherence in the damage award before us, and we remand the cause for further proceedings restricted to the question of the proper measure of Lehrman's damages.

To begin with, so far as we have been able to discern from the record, there was no allowance in the original jury verdict for mitigation of Lehrman's damages by the amount of his earnings in his current line of work. The income tax returns in the record indicate that Lehrman's salary expenses of running his gas station were not incurred as salary payments to himself; consequently, there seems to be no possibility that Lehrman's earnings above the net profits of the station (in the form of a salary paid to him by the station) might have been properly included in the measure of his damages. Rather, it appears that when Lehrman's gas business folded, he was freed for other paying forms of work, and that Lehrman could

be damaged only by the excess of any lost future net profits over his actual earnings in alternative employment. Thus, from the outset, the $60,000 for ten years, or $6,000 per year, figure which underlay the jury verdict was based upon too broad a conception of the damages caused Lehrman by Gulf's punitive withdrawal of TCA's.

Failure to instruct the jury to deduct a reasonable amount attributable to Lehrman's earnings after leaving the gas station business was the only defect in the lower court's charge to the jury. In light of this error in the underlying damage calculation of $6000 per year, the appropriateness of the district court's "remittitur" is not strictly at stake on this appeal. But we have several difficulties with the court's remittitur, and think it best to elaborate those difficulties at this point rather than to await the possibility of further confusion, error, and delay.

It is not clear whether the trial court's decision to enter judgment for Lehrman in the amended amount of $6,000 times three and one-half years, in lieu of the jury determination of $6,000 times ten years, (both sums trebled), constituted a determination of law or a determination of fact. If the district court meant to hold that the duration of the plaintiff's harm was, as a matter of fact, only three and one-half years, it was improper for the court to allow the jury to make a factual determination of ten years and then to overrule the jury's finding of fact by entering judgment contrary to it. The district court gave the plaintiff no chance to decide whether he wished to remit a portion of his damages or face the possibility of a new trial. Instead, when there was factual uncertainty over the amount and duration of plaintiff's harm, the court simply took a different view from the

jury's and entered judgment accordingly. In so doing, if that is what the court was doing, the trial court violated the command of the Seventh Amendment, which prohibits re-examination of the facts found by a jury. *Prochot v. Drew*, 7 Cir. 1960, 283 F.2d 904, 905; see 6A Moore's Federal Practice # 59.05 [3] n.36.

On the other hand, if the district court's "remittitur" was truly intended as a ruling that, as a matter of law, damages incurred by reason of an unlawful conspiracy to fix resale prices must be limited to the actual years of business operation, that proposition of law cannot stand. In cases involving refusal to deal, it is clear that damages cannot be limited to losses sustained before the plaintiff is unlawfully cut off from his supplier. E.g., *Osborn v. Sinclair Refining Co.*, 4 Cir. 1963, 324 F.2d 566. Whether a man's business is intentionally and immediately snuffed out, as by a refusal to deal, or whether it is slowly but surely forced under by anticompetitive wholesale pricing, the proper standard of measuring damages when a business is forced under by anti-competitive activity is the same: what financial advantage would the plaintiff have gained but for the actions of the defendant? The duration of the period during which the plaintiff might be expected to profit will vary from case to case; it is susceptible of no precise formulation, and must be left to the processes of the jury informed by the presentation of conflicting evidence. Of course, the court might properly instruct the jury that it may consider as one factor in its deliberations the length of time which the plaintiff had been in business as of the time of the defendant's anti-competitive actions; but the youth of a business, like the precise manner of its doing-in, will never alone be enough

to justify severe restrictions upon the duration of damages. The court may condition a new trial on remittitur if it feels strongly that the jury verdict is excessive. But it is arbitrary and improper to limit damages as a matter of law to the precise period of the plaintiff's business operations if the reason for that limitation is either the means used to drive the plaintiff out of business or the relatively short history of his business before its demise.

We remand the cause to the district court for a new trial only on the issue of damages. At the new trial, Lehrman may introduce additional evidence to provide the jury with a better "yardstick" to measure Lehrman's losses. There may be additional evidence to clarify the possible length of Lehrman's future tenure in the station and therefore the appropriate duration of future profits. Additional evidence will likely be necessary to provide some measure of the deduction from Lehrman's damages which must be attributed to the present and future earning capacity he now has which he would not have enjoyed had he continued to look chiefly to the station for his income and to devote most of his time to its operation.

The judgment of the district court as to Gulf's liability is AFFIRMED; but that court's judgment as to the amount of the plaintiff's damages is REVERSED and the cause REMANDED for further proceedings consistent with this opinion.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29,908

KENNETH LEHRMAN,
Plaintiff-Appellee,

versus

GULF OIL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(June 26, 1972)

Before WISDOM and COLEMAN, Circuit Judges, and BOYLE, District Judge.

BY THE COURT: It is ordered that the panel opinion be amended as follows:

1. Part II of the panel opinion shall be deleted and the substituted Part II, attached hereto, inserted in its place.

2. Footnotes 6 through 14 of the panel opinion shall be renumbered 9 through 17, respectively.

In all other respects, the panel adheres to its original opinion. The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

II.

JURISDICTION

At the outset, we are met with Gulf's contention that the lower court lacked subject matter jurisdiction over this case. Gulf says that its actions of which Lehrman complains, neither occurred in commerce nor had a "substantial adverse effect on interstate commerce", and that Lehrman therefore failed to make out a valid claim under the Sherman Act.[4] In support of its position, Gulf points

4. "Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal . . . ." 15 U.S.C. §1.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15.

out that although the crude oil from which the gasoline was made was produced 85 percent in Texas and 15 percent in Louisiana, the gasoline sold to Lehrman was manufactured entirely in Texas and once placed in the pipeline, never left Texas. Lehrman sold so little gasoline compared with Gulf's Texas and American sales that Lehrman's sales and Gulf's relations with Lehrman had only a "de minimis" effect on interstate commerce.

Without so deciding, we assume Gulf is correct in its contentions that gasoline sold by Lehrman never moved in interstate commerce before Lehrman sold it and that his gasoline sales were small relative to Gulf's national and state-wide totals. By the same token, we take it to be true that Gulf's TCA system is in effect throughout much of the Southwest and that this system does have a significant effect upon the distribution of large amounts of gasoline, some of which, of course, moves in interstate commerce before it is sold as well as after. There is evidence in the record to support this proposition and none to contradict it.

Lehrman has consistently asserted that the TCA system of pricing is in effect beyond his own operation and far beyond the Mart-Waco area, and that this broad focus is the proper one for a jurisdictional determination in this treble damage action. Gulf, however, would have us concentrate for purposes of determining jurisdiction upon the volume of business of the specific individual who complains of antitrust violation. The jurisdictional problem in this case, then, reduces to whether a business practice, benign on its face, with an undeniably powerful effect on interstate commerce, may be the subject of treble damage suit by a single entrepreneur, injured by coercive application of the practice, whose own operation is relatively

small and whose individual effect on interstate commerce is insignificant.

A. The Supreme Court considered a similar question in *Simpson v. Union Oil, supra,* where a single gasoline station operator successfully complained of price-fixing under a lease-consignment agreement which Union conceded was extensively used in eight Western states. Without any discussion of the volume of Simpson's own business, the Court had no trouble finding jurisdiction. It stated, though without elaboration, that "there is actionable wrong whenever *the restraint of trade or monopolistic practice* has an impact on the market; and *it matters not* that the complainant may be only one merchant". 377 U.S. at 16, 84 S.Ct. at____, 12 L.Ed.2d at 102 (emphasis added). *Cf. Klor's v. Broadway-Hale Stores,* 1959, 359 U.S. 207, 213, 79 S.Ct. 705, 3 L.Ed.2d 741, 745.

Gulf argues that *Simpson* is distinguishable from the present case. First, Simpson's gasoline may have originated outside California. As a result, Simpson's own business arguably had an effect on interstate commerce that was not insubstantial. But the forthright language of *Simpson,* quoted just above, is incompatible with this restrictive interpretation.[5] Moreover, there is simply no mention in the *Simpson* opinion of Simpson's individual impact on interstate commerce.

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5. See also Fortner Enterprises v. U. S. Steel Corp., 1969, 394 U.S. 495, 502, 89 S.Ct. 1252, 22 L.Ed.2d 495, 504:

"For the purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, . . . the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit."

Gulf's second argument is more troublesome. Gulf contends that *Simpson*, unlike the present case,[6] holds only that a single, intrastate operator may sue in treble damages if he is the victim of a broadly-utilized practice whose adverse effect on competition may be determined *on its face*. In *Simpson*, the anticompetitive vices of the lease-consignment system of retail distribution were uniform throughout the Union Oil distribution network. Here, Gulf says, we deal with a facially benign business practice, not uniform throughout the area of its use, and subject to abuse only on a case-by-case basis—subject to abuse, that is, only *as applied*. Thus the TCA pricing system is arguably a "combination, contract, or conspiracy" in restraint of Lehrman's trade only—by hypothesis, not "trade . . . among the several States."

We decline Gulf's invitation to read *Simpson* narrowly; we consider its treatment of Lehrman and the harm to the nation's commerce that would be threatened by allowing Gulf's behavior to go uncorrected. The TCA network throughout the Southwest (indeed, throughout the rest of the United States) constituted the applicable "contract, combination, or conspiracy" of Gulf with its retailers and with its competitor Cape Oil Company. (See Part III, *infra*.) Because of the broad scope of the TCA mechanism, however inherently compatible with competition, the treatment of Lehrman when he disobeyed Gulf's price "suggestions" transformed a practice benign on its face

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6. In Part III of this opinion, *infra*, we do not hold the TCA system bad "on its face", but only "as applied" to Lehrman. In other words, each Gulf station operator who asserts that his prices have been fixed, to his detriment, by the TCA mechanism will have to persuade the jury that the system was in fact used coercively towards him.

into a coercive practice with untold geographical potential for deterring Gulf retailers from freely determining their own retail prices and for reassuring Cape Oil of Gulf's resolve to enforce Gulf's "suggested" prices. In short, after the events giving rise to this litigation, Gulf had injected into it TCA pricing mechanism a threat to secure compliance with suggested retail prices. The means for securing such compliance went well beyond "mere announcement of [Gulf's] policy and the simple refusal to deal" if the suggested prices were not adhered to. *United States v. Parke, Davis & Co.*, 1960, 362 U.S. 29, 44, 80 S.Ct. 503, 4 L.Ed.2d 505, 515. Whether or not Gulf might actually enforce its threat to treat other retail price cutters in its distribution system as it dealt with Lehrman, the threat to do so was there and took its coercive toll as surely as if it had been written into a contract as in *Simpson*.

If, then, the TCA system as a whole provides us with jurisdiction as a "contract, combination or conspiracy . . . in restraint of trade between the States", another question arises: how does the system as a whole escape condemnation under the Sherman Act? The TCA system is, and always will be, a "contract, combination, or conspiracy." It is, however, a "contract, combination, or conspiracy . . . in restraint of trade . . . among the several States," only insofar as and at such times as Gulf couples the TCA system with a credible threat to vary dealer TCA's as a means of coercing obedience to a Gulf-determined schedule of retail prices. This threat was credible and outstanding in the wake of Gulf's treatment of Lehrman; at the time Lehrman brought suit, the TCA system operated as a widespread conspiracy in restraint of trade and Lehrman had been injured "by reason of" the TCA system. In short,

then, the TCA system as a whole furnishes a jurisdictional handle because the system, in all its area of application, was a coercive device for resale price maintenance; yet the system as a whole need not be condemned as anti-competitive since it was only Gulf's actions toward Lehrman that infected the system with its credible threat of reprisals for disobedience.

Today's jurisdictional basis is compelled by the policies of the Sherman Act and, in particular, by the reasons for the treble damage remedy. It would be exceedingly unfortunate if large enterprises could, without federal anti-trust scrutiny, use small, intrastate operators as a way of making known certain unspoken and unwritten features of broadly utilized business practices which are not anti-competitive on their face. In other words, from a pragmatic view, it is impossible to ignore the impact of a supplier's conduct towards one or more wholly intrastate retailers on the supplier's dealings with all his retailers, intrastate and interstate. See *Schulman v. Burlington Industries*, S.D.N.Y. 1966, 255 F. Supp. 847, 852; *Burkhead v. Phillips Petroleum Co.*, N.D. Cal. 1970, 308 F. Supp. 120, 124.

It is clear from *Simpson* that a single, intrastate dealer may sue in treble damages if he is the victim of a broad practice whose adverse effect on competition may be determined on its face. The suit is allowed because "Congress has encouraged private anti-trust litigation not merely to compensate those who have been directly injured but to vindicate the important public interst in free competition." Fortner, *supra*, 394 U.S. at 502, 22 L.Ed.2d at 504; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir. 1954, 214 F.2d 891, 893. "As applied" anticompetitive

practices are equally inimical to the public interest in free competition. If anything, the need for multiplying enforcement agencies to make the antitrust laws more effective is more acute in the intrastate, "as applied" situation presented today than in the "on its face" situation in *Simpson*. The threat to competition is as great as in the "as applied" anticompetitive situation, for the practical control over prices through fear of reprisal in the one case approximates outright contractual control in the other. Yet detection of the coercion and control is far more subtle and its detection more difficult in the "as applied" situation.

There is, of course, no constitutional barrier to jurisdiction founded upon the rationale asserted by Lehrman. Interstate commerce "is a practical conception", and as a result "interferences with that commerce must be appraised by a judgment that does not ignore actual experience." *NLRB v. Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 41-42, ____ S.Ct. ____, 81 L.Ed. 893, 914. A wide-ranging business practice of the kind engaged in by Gulf undoubtedly affects the nation's commerce. As such, it is within the power of Congress to regulate; and the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement." *The Daniel Ball*, 18 ____, 10 Wall. 557, 564, 19 L.Ed. 999, 1001. Thus Congress would surely have the power to legislate directly in control or prevention of a broadly used business practice even if, as a matter of legislative fact, the practice were abused in individual instances only against intrastate operators.[7]

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7. See United States v. Perez, 1971, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686. There the Supreme Court upheld Perez's conviction under Title II of the Consumer Credit Protection Act, 18 U.S.C. §§891 et seq. (1964 ed., Supp. V), stating that *"a class of activities*

Among the tools at the disposal of Congress in regulating practices which it believes to have a substantial effect upon commerce are judicial remedies conducive to detecting, punishing, and deterring the undesirable tendencies of those practices. Congress might have vested in the Executive branch exclusive power to sue antitrust violators, thereby requiring any single individual aggrieved by misuse of a widely-used practice affecting commerce to enlist government support in prosecuting a lawsuit to end the practice entirely or to punish and deter its commission in the future. But Congress has explicitly authorized the treble damage action by aggrieved private persons as a supplement to judicial action initiated by the Executive branch. The treble damage action is therefore a constitutional exercise of the commerce power even when a single treble damage plaintiff has no appreciable impact on interstate commerce, because the requisite nexus under the commerce power is that between the practice sought to be regulated and the flow of interstate commerce. The treble damage action is, in effect, a form of Congressional regulation less restrictive than direct government litigation aimed at a business practice as a whole. If the one is constitutional, the other is, too.

[is] properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce." 402 U.S. at 152, 28 L.Ed.2d at 691 (emphasis in original). The Court concluded that Perez, regardless of the intrastate confines of the practice for which he was convicted, was clearly a member of the class which engages in "extortionate credit transactions" and that those transactions were adequately found by Congress to affect interstate commerce. "Where the class of *activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances' of the class. Maryland v. Wirtz, 196 , 392 U.S. 183, 193, 88 S.Ct. 2017, 20 L.Ed.2d 1020, 1029." 402 U.S. at 154, 28 L.Ed.2d at 692 (emphasis in original).

To summarize: a treble damage complaint under the Sherman Act "must allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public flow of interstate commerce." *Kinnear-Weed Corp. v. Humble Oil & Refining Corp., supra,* at 894. When, as in Lehrman's case, a broadly-utilized but facially benign business practice is applied in anticompetitive fashion against a single operator, it matters not that his own trade has only an insubstantial effect on interstate commerce. For the conduct of the defendant injects a broad, coercive threat into the otherwise benign practice and is therefore "reasonably calculated to prejudice the public flow of interstate commerce."

B. As a secondary ground for jurisdiction, we decide that Lehrman's business did have an impact on interstate commerce that was not "insignificant or insubstantial." *International Salt Co. v. United States,* 1947, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 120. Lehrman's station sold not just gasoline, but tires, batteries, and accessories as well. When the failure of the gasoline operation forced Lehrman to discontinue his entire business, the "TBA" portion of his business went under along with the rest of the operation. There was uncontradicted testimony from Gulf's operations manager that many of the TBA items in Lehrman's stock were products which had moved in interstate commerce, and which did not, as Lehrman's gasoline evidently did, originate in Texas:

> Q. Now, also, Gulf sponsors certain tires, batteries and accessories that they like for their dealers to sell: isn't that true?
>
> A. That's true.

Q. And the biggest part of these are manufactured outside the State of Texas and shipped into the State of Texas; now, isn't that true, sir?

A. That's right.

Q. And you would expect to find stations like Mr. Lehrman's or any other station up there in Dawson, Groesbeck, Lufkin, Port Arthur, all up and down that Mesquite Pipe Line, to be selling TBA items, wouldn't you?

A. Yes, sir.

Q. Gulf-sponsored TBA items?

A. I would suppose.

Q. And these items are items that are manufactured in other States and shipped in here to be sold through these stations?

A. That's right.

We conclude that the demise of Lehrman's business had an appreciable impact upon the flow of TBA goods from states where such goods are manufactured into Texas. The effect was appreciable because, while small relative to total Gulf TBA sales, the gross amount of such sales would be significant over the extended period of time Lehrman might have been able to continue in business.

Gulf's only quarrel with this secondary jurisdictional rationale is that "almost without exception, all Gulf TBA items sold in Texas are supplied out of a Gulf mixer-warehouse in the Dallas-Fort Worth area where they are stored after Gulf purchases them from various suppliers." That Gulf TBA items "come to rest" before distribution to Gulf retailers is irrelevant. The requisite effect on interstate commerce would still result from a reduced or altered flow of goods into the State of Texas from without

the state. The Supreme Court's holding in *Burke v. Ford*, 1967, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554, is precisely in point:

> The District Court and the Court of Appeals found that the liquor "came to rest" in the wholesalers' warehouses and that interstate commerce ceased at that point. Hence, they concluded that the wholesalers' division of the Oklahoma market did not take place "in interstate commerce." But whatever the validity of that conclusion, it does not end the matter. For it is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce.

389 U.S. at 320, 19 L.Ed.2d at 555.

We are also not persuaded to alter our conclusion that the jury might have premised its jurisdictional finding on TBA sales by the holding of the Ninth Circuit in *Page v. Work*, 1961, 290 F.2d 323, cert. den. 368 U.S. 875. In that case, the alleged anticompetitive practices of a competitor publication forced the plaintiff newspaper to dissolve and to sell its assets. The assets were purchased by a subsidiary of the defendant and the subsidiary continued publication of the newspaper alleged to have been injured. The Ninth Circuit rejected the contention that a conspiracy to control local legal advertising substantially affected interstate commerce because of its effect on the interstate newsprint purchases of the plaintiff newspaper. But *Page* does not reject the *principle* of harm to the interstate market in newsprint as a jurisdictional handle over a conspiracy directed to another, local product. Rather, Page simply says that "the argument that the newsprint market suffered because [plaintiff] ceased buy-

ing newsprint when it went out of business is not convincing. There is no indication that [defendant who took over plaintiff's operation] purchased any less newsprint from out of state." 290 F.2d at 332.

The rationale is inapplicable to Lehrman. Gulf's actions killed off Lehrman's business permanently. There has been a reduction in Gulf's interstate purchase of tires, batteries, and accessories because, even if the absolute level of such purchases remained constant after Lehrman went out of business, interstate TBA purchases would have reached above that constant had Lehrman continued in operation. There is no indication that Gulf's interstate purchases of TBA items are oblivious to fluctuations in the number of its operating retailers in these times of sophisticated, data-sensitive corporate management.

We do not accept the suggestion that *Page v. Work* holds, as a matter of law, that a conspiracy to restrain trade in an intrastate product cannot, as a matter of law, affect trade in another, interstate product sufficiently to trigger Sherman Act jurisdiction. The focus of the act is to protect interstate trade from interferences of all degrees of subtlety. The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business. We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the "interstate culpability" of those who engage in anti-competitive practices. No matter how intrastate the objects of anticompetitive

conspirators, they must take their victims' involvement in interstate commerce as they find them.

C. A salient feature of the jurisdictional question in this case is that we are concerned with the Sherman Act and not the Robinson-Patman Act. Gulf has ignored this distinction. This, on page one of its petition for rehearing, Gulf says we have "overruled at least three long established, well recognized and often cited Fifth Circuit cases."[8] Gulf also tries to connect the present case with the dissenting opinion of Judge Coleman in *Littlejohn v. Shell Oil Company*, 5 Cir. 1972, ____ F.2d ____ [No. 71-2090; March 22, 1962]. Yet each of the cases cited by Gulf arose under the Robinson-Patman Act, including *Littlejohn*.

We have attempted to make it clear that jurisdiction under the Robinson-Patman Act is very different from jurisdiction under the Sherman Act.

> To maintain an action under Section 13(a) the plaintiff must allege and prove, inter alia: (1) that the defendant is engaged in commerce; (2) that, in the course of such commerce, the defendant has discriminated in price between different purchasers of commodities of like grade and quality; (3) that *"either or any of the purchases involved in such discrimination are in commerce"*; and (4) that there is likely to be a severe, adverse effect on competition. (Emphasis added.) 15 U.S.C. § 13(a). The language of the Act — requiring discriminatory sales to be "in commerce" — is far narrower in scope than the "effect on commerce" test applicable under the Sher-

8. Walker Oil v. Hudson Oil, 5 Cir. 1969, 414 F.2d 588; Abramson v. Colonial Oil Co., 5 Cir. 1968; Borden v. FTC, 1964, 339 F.2d 953. The *Borden* case was decided by the United States Court of Appeals for the Seventh Circuit.

man Antitrust Act. *See*, e.g., Foremost Dairies, Inc. v. FTC, 5th Cir. 1965, 348 F.2d 674; Jones v. Metzger Dairies, Inc., 5th Cir. 1964, 334 F.2d 919. In appropriate cases, the Sherman Act may be applied to intrastate activities, including retail sales, if they *affect* interstate commerce. *See, e.g.*, United States v. Greater Kansas City Retail Coal Merchants' Ass'n, W.D. Mo. 1949, 85 F. Supp. 503. Under the terms of section 13(a), however, at least one of the sales alleged to be discriminatory must actually be *in* interstate commerce. Walker Oil Co. v. Hudson Oil Co., 5th Cir. 1969, 414 F.2d 588 [Dated July 8, 1969]. In Hiram Walker, Inc. v. A & S Tropical, Inc., 5th Cir. 1969, 407 F.2d 4 [Dated January 31, 1969], this Court stated:

> [I]n order to come within the provisions of the Robinson-Patman Act, the [plaintiff] must demonstrate that the discriminatory sales were "in commerce." * * * Thus, the Robinson-Patman Act is applicable only where the allegedly discriminatory transactions took place in interstate commerce. That is, "* * * at least one of the two transactions which, when compared, generate a discrimination must cross a state line."

See also Borden Company v. FTC, 7th Cir. 1964, 339 F.2d 953; Willard Dairy Corp. v. National Dairy Products Corp., 6th Cir. 1962, 309 F.2d 943.

Cliff Food Stores, Inc. v. Kroger's Inc., 5 Cir. 1969, 417 F.2d 203, 208-09.

With our discussion in *Cliff Food Stores*, it is instructive to compare the language of the Supreme Court discussing jurisdiction under the Sherman Act, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, (1948) 334 U.S. 219, 234:

> [T]he inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence.

For the reasons stated, we conclude that it was open to the jury to respond to that "vital question" in the affirmative.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 29908

D. C. Docket No. W-68-CA-4

KENNETH LEHRMAN,
Plaintiff-Appellee,

versus

GULF OIL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM and COLEMAN, Circuit Judges, and BOYLE*, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

* Hon. Edward J. Boyle, Sr., U. S. District Judge, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause as to Gulf's liability be, and the same is hereby affirmed;

It is further that the judgment of the said District Court in this cause as to the amount of the plaintiff's damages be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that defendant-appellant be condemned to pay two-thirds of the costs on appeal to be taxed by the Clerk of this Court and plaintiff-appellee be condemned to pay one-third of said costs.

March 15, 1972

Issued as Mandate: July 5, 1972.